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No. 00-544

IN THE

Supreme Court of the United States

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

A. A Direct Conflict Exists Among The Courts Of Appeals On An Important Federal Question

Petitioner has demonstrated that the decision below conflicts directly with decisions of the Third, Ninth and Eleventh Circuits, which hold that an order adopting a magistrate judge's report and recommendation is not a "separate document" under Rule 58, and that entry of such an order does not begin the running of the time for appeal.[1] Respondents cannot and do not deny that a circuit conflict exists. Instead, they counter that the decisions in *Kadelski*, *Newsome* and *Yang* all concerned the timeliness of attorney's fees applications under the Equal Access to Justice Act (EAJA) in Social Security Act cases, and argue that "any split is limited in scope and unlikely to recur." (Br. in Opp. 19.) This argument is wholly unconvincing.

The question under EAJA is when the time for appeal has expired—an issue that can only be resolved by examining whether the trial court entered a "separate document" under Rule 58.[2] Accordingly, the holdings in *Kadelski*, *Newsome* and *Yang* were fundamentally premised upon those courts'

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[1] *See Kadelski v. Sullivan*, 30 F.3d 399 (3d Cir. 1994); *Yang v. Shalala*, 22 F.3d 213 (9th Cir. 1994); *Newsome v. Shalala*, 8 F.3d 775 (11th Cir. 1993).

[2] EAJA provides that an application for attorneys fees must be presented "within thirty days of final judgment in the action . . . ." 28 U.S.C. § 2412(d)(1)(B). "Final" means "not appealable," and thus EAJA requires that a fee application be filed within thirty days "after the time for appeal has ended." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (where no separate document in conformity with Rule 58 was entered, judgment remained "appealable," and application for fees was timely).

application of the separate document requirement under Rule 58. It therefore is of no consequence that those decisions addressed the timeliness of EAJA fee awards, rather than the timeliness of an appeal. Those courts' rulings regarding Rule 58 clash directly with the holding of the court of appeals below. There is no principled basis for limiting those Rule 58 rulings to the EAJA context.

There also is no basis for limiting the applicability of *Kadelski, Newsome* and *Yang* to Social Security cases. Social Security cases are governed by the same rules of civil procedure as other cases, and Respondents fail to explain how a decision construing Rule 58 could be limited to the context of Social Security. In any event, the court below did not distinguish *Kadelski*, *Newsome* and *Yang* as inapplicable. Rather, it recognized that those cases conflicted directly with its own reasoning, and rejected them as incorrect on the merits. (App. 8a.)

Respondents argue that "the majority of the circuits that have addressed the issue" have held that Rule 58 does not require that an order adopting a magistrate judge's report and recommendation be accompanied by a separate judgment document, citing decisions of the D.C., Fifth, Eighth and Tenth Circuits.[3] (Br. in Opp. 18.) But this contention—like

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[3] Respondents rely on the same decisions cited by Petitioner as evidence of the circuit split: *United States v. Perez*, 736 F.2d 236 (5th Cir. 1984), *Mason v. Groose*, 942 F.2d 515 (8th Cir. 1991), and *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). Respondents also cite *Alman v. Taunton Sportswear Mfg. Corp.*, 857 F.2d 840, 842-43 (1st Cir. 1988), as standing for the proposition that an order adopting a magistrate judge's report and recommendation need not be accompanied by a separate judgment. *Kadelski* cited *Alman* as standing for the same proposition. 30 F.3d at 402. In fact, however, *Alman* makes no reference to any magistrate judge's report and recommendation.

Respondents' argument that they believe *Kadelski*, *Newsome* and *Yang* to be "based on a misreading of *Shalala v. Schaefer*," and hence incorrectly decided—does not prove the absence of a direct circuit split, but rather precisely the opposite. (*See* Br. in Opp. 19.) The fact that four circuits disagree with three other circuits is a compelling reason for the Court to grant review in this case.

Furthermore, the direct conflict between the Third, Ninth and Eleventh Circuits, on the one hand, and the D.C., Fifth, Eighth and Tenth Circuits, on the other, is unlikely to be resolved without this Court's intervention. The split derives in large measure from a fundamental disagreement in the circuits' interpretation of this Court's decision in *Shalala v. Schaefer*. The Third Circuit in *Kadelski* expressly declared the Fifth, Eighth and Tenth Circuit cases to have been overruled by *Shalala v. Schaefer*.[4] The D.C. Circuit below, however, rejected *Kadelski*, *Newsome*, and *Yang* as wrongly decided, professing itself "uncertain how these decisions can be extracted from *Schaefer*." (App. 8a.) In this situation, only this Court can provide adequate guidance on the important question presented.

B. This Case Presents The Court With An Opportunity To Resolve The General Confusion Among The Courts Of Appeals Regarding What Constitutes A Separate Document Under Rule 58

Respondents' opposition does not dispute that the courts of appeals have exhibited considerable confusion regarding the contents of a separate document under Rule 58. In addition to the direct conflict regarding whether an order

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[4] *See Kadelski*, 30 F.3d at 402 (holding *Mason v. Groose*, *Laidley v. McClain*, and *United States v. Perez* to be "no longer controlling in light of *Schaefer*").

adopting a magistrate judge's report and recommendation requires a separate document, circuits have differed more fundamentally on whether compliance with Rule 58 is measured by the brevity of a document, the amount of legal reasoning or citations, or the intent of the district court. Respondents cannot deny that intervention by this Court is needed to establish uniformity.[5]

Respondents address this confusion by noting that (except for the direct conflict described in Section A, *supra*) the different circuits' decisions do not all *directly* conflict, and that other circuits may have reached the same result as the court below, but for different reasons. (Br. in Opp. 14-15.) But this response does nothing to address Petitioner's argument—that confusion and disarray among the circuits requires resolution by this Court.

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[5] Nor have the Judicial Conference Advisory Committees on the Appellate and Civil Rules shown any likelihood of clarifying the required contents of a separate document under Rule 58. The advisory committees recently have proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, including changes to Rule 58 and to Fed. R. App. P. 4. *See* Memorandum to the Bench, Bar, and Public, Aug. 15, 2000 (available at http://www.uscourts.gov/rules/). But the advisory committees have shown no inclination either to abandon the separate document requirement or to clarify its contents, even though they have acknowledged the judicial confusion noted above.

The Advisory Committee notes state that the "simple requirement" of Rule 58 "has been ignored in many cases," leading to "many and horridly confused problems under Appellate Rule 4(a)." *Id.*, Proposed Amendments to the Federal Rules of Civil Procedure at 15. While clarifying other issues under Rule 58, the proposed rule "preserves the core of the present separate document requirement," and the Committee states that "no attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document." *Id.* It falls to this Court to resolve that confusion.

Respondents agree that the purpose of the Rule 58 separate document requirement is to provide clarity as to when the time for appeal begins to run. (Br. in Opp. 11.) They do not disagree that such clarity is important, and that there should be national uniformity on Rule 58. Indeed, four judges of the court of appeals below dissented from the denial of rehearing en banc because they found this case to be one of "exceptional importance," in which the panel decision is likely to "produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.)

This case presents an opportunity for the Court to clarify the contents of a Rule 58 separate document, and resolve conclusively the confusion in the circuits that has led to the loss of appeal rights in cases such as this one.

C. The Procedural Issues Raised In This Petition Do Not Require Resolution Of The Factual Disputes In The Underlying Case

Respondents devote considerable space to a recitation of their version of the underlying lawsuit, which concerns continued discrimination and retaliation against a District of Columbia civil servant, after a jury held three of her supervisors personally liable for sexual harassment and intentional infliction of emotional distress.[6] (Br. in Opp. 1-7.) Respondents' factual contentions are irrelevant to this petition. The court of appeals did not reach the merits of the district court's grant of summary judgment. The only issue decided by the court below was the timeliness of the appeal, and that

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[6] The decision of the District of Columbia Court of Appeals in Ms. Kidd's original litigation against the District of Columbia provides an extensive description of the underlying facts. *See King v. Kidd*, 640 A.2d 656 (D.C. 1993).

is the only issue before the Court on this petition. Although the propriety of the district court's grant of summary judgment would have to be resolved by the court of appeals on remand from any decision of this Court, this petition presents the Court with an opportunity to address and clarify the requirements of Rule 58, without any need to address the factual record in this case.

Respondents' "Counter-Statement of the Case" erroneously presents Respondents' factual arguments as though they were the findings of the court below. Respondents rely on several affidavits that they submitted at the summary judgment stage. (Br. in Opp. 2-4.) But Petitioner submitted extensive evidence contradicting those affidavits. (*See* App. 20a-21a.) The only judge of the court of appeals below to address the merits of the grant of summary judgment, Judge Tatel in dissent, agreed with Petitioner that disputed issues of material fact required reversal of the grant of summary judgment, and had "no doubt the case should have gone to a jury." (App. 21a.)

In addition, Respondents' characterization of the record below is erroneous. For example, Respondents argue that "although technically *pro se*, Kidd was represented by six lawyers during her litigation in the district court." (Br. in Opp. 5.)[7] In fact, although the district court made several unsuccessful attempts to appoint counsel, it is undisputed that Ms. Kidd ultimately litigated her case *pro se*, and that she was proceeding without counsel at the time that the district court entered the order that is the subject of this petition. (App. 3a.)

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[7] To the extent that Respondents are suggesting that Petitioner was a "difficult" litigant, there is no factual support for such a proposition in the record. In addition, such an issue is of course irrelevant to this Petition.

Respondents also quibble with the proposition that upon returning to work after her successful trial against Respondents, Ms. Kidd was placed under the supervision of the same individuals found personally liable to her. (Br. in Opp. 3 & n.3.) They argue that the supervisor who had sexually assaulted her no longer had daily interaction with her, and that another supervisor found liable to her for intentional infliction of emotional distress "distanced himself from matters involving Kidd and eventually left the District Government," although they acknowledge that he was still "in the chain of command." (Br. in Opp. 3 & n.3.) But this supervisor had *never* been Ms. Kidd's "direct" supervisor, and had only been "in the chain of command" at the time when a jury determined that he had intentionally inflicted emotional distress by abusing his supervisory authority, colluding with Ms. Kidd's harasser, and retaliating against her. *See King v. Kidd*, 640 A.2d at 674-75. In fact, the record indicates that this individual, as well as another supervisor found liable to Ms. Kidd, took part in the decision to deny her a promotion, even though they were jointly and severally liable to her for nearly $300,000 in compensatory and punitive damages at the time they made that decision. (D.C. Cir. App. 376-77; *see* App. 19a.)

CONCLUSION

For the reasons stated above, and in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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